Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

LEONARD GENE LIED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. GIBSON
Attorney for Petitioner
State Bar Number 07872000
521 Texas Avenue
El Paso, Texas 79901
(915) 532-2977

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49 pp

QUESTIONS PRESENTED

WHETHER THE RULE THAT WHEN THE GOVERNMENT ALLEGES A SINGLE CONSPIRACY AND PROVES MULTIPLE CONSPIRACIES AND A DEFENDANT'S INVOLVEMENT IN AT LEAST ONE OF THEM, THERE IS NO VARIANCE AFFECTING THAT DEFENDANT'S SUBSTANTIAL RIGHTS, VIOLATES THE LAW EXPRESSED IN *KOTTEAKOS v. UNITED STATES*, 66 S.Ct. 1239 (1946).

WHETHER THE STANDARD MULTIPLE CONSPIRACY JURY INSTRUCTION IS A SUFFICIENT SAFEGUARD AGAINST THE POSSIBILITY OF GUILT TRANSFERENCE OR "SPILLOVER EFFECT" REQUIRED BY *KOTTEAKOS v. UNITED STATES*, 66 S.Ct. 1239 (1946).

WHETHER THE CIRCUIT COURTS OF APPEALS HAVE ROUTINELY IGNORED THE TEACHINGS OF *KOTTEAKOS v. UNITED STATES*, 66 S.Ct. 1239 (1946).

WHETHER THE RULE THAT THE UNCORROBORATED TESTIMONY OF A GOVERNMENT WITNESS PARTICIPATING IN THE CHARGED OFFENSE WILL SUSTAIN A CONVICTION IS VIOLATIVE OF THE DUE PROCESS PROVISION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

LIST OF ALL PARTIES

NOTE: Although thirty-four people were named in the superseding indictment in the Trial Court, only those listed below were parties to appellate proceedings in the Fifth Circuit.

1. United States of America
2. Maxwell Gene Wallace
3. Lloyd Maestas
4. Bob Allen Dickinson
5. Leonard Gene Lied
6. Avelino Gil Terrazas
7. Ruben Gallegos
8. Hector Mendoza-Garcia
9. William Hobart Russell

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PETITION FOR WRIT OF CERTIORARI

The Petitioner petitions this Court to grant a Writ of Certiorari reviewing the decision of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Leonard Gene Lied, et al.*, No. 95-50077 and thereafter reverse that decision.

CITATIONS TO OPINION BELOW

The original opinion of the Court of Appeals, rendered April 10, 1997, styled *U.S. v. Arturo Pena Rodriguez, et al.*, appears at 110 F.3d 1122 (CA 5 1997). Said opinion appears herein in the Appendix page App. 1. The order overruling Motion for Rehearing and Suggestion for Rehearing En Banc, entered on May 22, 1997, appears in the Appendix at page App. 28. No opinion was issued on the order overruling Motion for Rehearing and Suggestion for Rehearing En Banc.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on May 22, 1997. This petition is timely filed within ninety (90) days of said date, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

Rule 14, F.R.C.P., entitled Relief From Prejudicial Joinder, provides in pertinent part that:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide what other relief justice requires.

Rule 8(b), F.R.C.P. provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT OF THE CASE

A. Course And Proceedings Below

Petitioner was charged in Counts 1 and 8 of an 8 count indictment (R. pp. 1-12) with conspiracy to possess marijuana and cocaine with intent to distribute each in Count 1 and in Count 8 with conducting financial transactions effecting interstate and foreign commerce involving the proceeds of a conspiracy to possess a quantity of marijuana and a quantity of cocaine with intent to distribute same. Thirty-two individuals were named as defendants in Count 1 and 9 of the 32 were named in Count 8. Other counts named various combinations of the 32 defendants named in Count 1, except for Petitioner Lied.

Petitioner moved to sever counts and defendants pretrial (R. pp. 87-90, 93-96). The severance motions were overruled (R. pp. 106-108). The cause proceeded to trial and all defendants were convicted on the counts naming them with the exception of 1 defendant in Count 1 and 1 in Count 4 where the jury was hung. Some, but not all, of the defendants tried appealed to the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. After submission of briefs and oral argument, a panel affirmed the convictions of all defendant/appellants (see attached opinion). A Motion for Rehearing and Suggestion For Rehearing in Banc were overruled on May 22, 1997.

B. Statement Of Facts

Virtually all of the evidence adduced by the Government in the trial of the case did not relate to Petitioner Lied. One Randal Bowers, testifying for the Government (SF pp. 639-1190) described the conspiracy in broad terms. Eduardo Gonzalez and his associate Avelino Terrazas supplied cocaine and marijuana to a group of individuals who smuggled it from the El Paso, Texas area to destinations in California, New Mexico and Oklahoma. Many conspirators were named by Bowers but omitted were the names of Petitioner Lied, Defendant Dickinson, Defendant Russell and the Government's other star witness, Felipe Madrid. The investigation into this conspiracy was conducted by Mr. Andrew Gillispie, U.S. Customs Agent. His testimony (SF pp. 2616-2722) contains no reference to Petitioner Lied or Defendants Dickinson and Russell, other than some matters contained in his reports consisting of what he was told by the Government's witness Felipe Madrid.

The Customs Agents were apparently unaware of Felipe Madrid until he was arrested in April of 1992, near Lordsburg, New Mexico with a large load of cocaine in an 18 wheel truck. Madrid concedes on cross-examination that this offense was a separate or side deal between himself and the kingpin, Gonzalez. Petitioner Lied and Defendants Dickinson and Russell had no involvement. (SF pp. 1155-1556). However, this transaction was sufficient to focus Government attention on Mr. Madrid. Agent Gillispie persuaded Mr. Madrid's ex-wife, Gloria Stitt, (who was also involved in the transaction for which Mr. Madrid was in the federal penitentiary) to visit the federal penitentiary in Florence, Colorado, and interview

her ex-husband while wearing a "wire." Statements by Madrid to his ex-wife directed the attention of Agent Gillispie to Petitioner Lied and Defendants Dickinson and Russell. Mr. Madrid was told by Agent Gillispie that the Government would assist him in obtaining a five year reduction in his sentence (SF pp. 2888-2889) if he would testify and implicate Petitioner in narcotics offenses.

Madrid testified that he introduced Petitioner to Eduardo Gonzalez (the Government's alleged kingpin of the conspiracy) in 1990, but also that this did not occur until 1991 (SF p. 1558) (SF p. 1394). Madrid was a middle man between Eduardo Gonzalez and Petitioner and acted as a Spanish-English interpreter because they did not speak each others' language (SF pp. 1395-1396). Gonzalez was a supplier of marijuana and Petitioner was a distributor and Madrid provided transportation (SF p. 1398). He further testified that he owned a trucking company called United Freight Service which opened its first office on Davenport Street and was later moved to Thunderbird Street. Petitioner was associated with this business for a short period, after which he left to pursue other endeavors. Additionally, warehouse facilities were rented by Madrid in late 1991, first on Goodyear Street and then on Rojas Street (SF pp. 1398-1400). Originally the trucking business was started as a legitimate enterprise and a large amount of legitimate hauling continued throughout the life of the business (SF p. 1560). Madrid testified that he had a van which he would leave parked at some location in El Paso. Someone would pick up the van and call him in a short time to retrieve it. The marijuana would be in the van. These arrangements were made with Eduardo Gonzalez. The marijuana would then be taken to a stash

house on Dale Douglas Street (leased to Defendant Dickinson) where it would be weighed and repackaged and then taken to the warehouse on Rojas Street and loaded into the truck (SF pp. 1404-1411).

Records of weight were written down and passed to Petitioner. On a few occasions Petitioner paid the money for the marijuana to Mr. Madrid who would then pay it to Eduardo Gonzalez (SF pp. 1413-1414). Madrid thereafter described in detail the packaging and loading of the marijuana (SF pp. 1416-1422) and stated that he would drive the large trucks to the Dallas area and deliver it to one of two warehouses leased by the conspirators there.

Petitioner's role was to oversee the distribution of the marijuana (SF p. 1427). At some point in the proceedings, Petitioner's place was taken by Bill Russell and Mr. Madrid did not see Petitioner anymore (SF pp. 1431-1432). Mr. Madrid only ran one load of cocaine which he got from Eduardo Gonzalez and with which he was arrested in April, 1992 (SF p. 1432). Madrid was never apprehended carrying any contraband anywhere (SF p. 1573) except on that one occasion.

The record contains voluminous evidence indicating that Gonzalez furnished contraband for shipment to locations in Oklahoma, California, Indiana and New Mexico, again, none of which evidence relates to the Government's case against Petitioner.

Eighteen defendants actually went to trial. The Government called over 100 witnesses and entered more than 800 exhibits into evidence during the trial which lasted three weeks (*Pena Rodriguez, supra,* pp. 1122-1123). The *only* evidence against Petitioner Lied (emphasis supplied)

was the testimony of the convict Felipe Madrid. There were no phone calls, no recordings, no seizures of contraband, no motel registrations, no intercepted conversations, no testimony from any party other than Felipe Madrid, and no one single piece of paper or any physical evidence to connect Petitioner to this conspiracy.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. In General

Pursuant to the provisions of Rule 10, Supreme Court Rules, (c), the Fifth Circuit has decided an issue in conflict with a relevant decision of the Supreme Court, *Kotteakos v. United States*, 66 S.Ct. 1239 (1946).

Additionally, numerous circuit courts have distinguished the teachings of *Kotteakos supra*, by holding that: The trial was not as lengthy; the number of alleged conspirators was less; the exhibits were fewer; the number of conspiracies proven was smaller; the proof was evident and the jury could not have been confused; where some defendants were acquitted entirely or some defendants acquitted on some counts, the jury could not have been confused by the complexity of the case and, finally, the standard jury instruction on multiple conspiracies is sufficient to protect against transference of guilt and spillover effect.

Stated differently, virtually all of the circuit courts have devised someway to circumvent the edict of *Kotteakos*, vis; congress did not "authorize the government to string together, for common trial, eight or more separate

and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all." (*Kotteakos*, p. 1252).

The standard multiple conspiracy jury instruction commands conviction under the exact circumstances decried in *Kotteakos* where one man is the nexus of a number of different conspiracies.

Finally, developments in the law of conspiracy have proceeded to the point where the government can lodge an accusation against an accused based upon the totally uncorroborated testimony of somebody convicted of an unrelated offense, include an allegation of conspiracy with the convict, toss in 20 or 30 conspiracy allegations against others having no relation to the charges against the defendant, and hope that the spillover effect will result in shoring up a weak case. It is simply a denial of substantive due process to allow government agents to go into the prisons, promise substantial rewards to convicts in exchange for the denouncing of citizens against whom absolutely no other evidence exists, and prosecute and convict on that guidance alone.

B. Specifically With Respect to the Instant Case

This Court, in *Kotteakos v. United States*, 66 S.Ct. 1239 (1946), considered the issue of "whether Petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the government admits shows not one conspiracy but some 8 or

more different ones of the same sort executed through a common key figure, Simon Brown." (p. 1241).

As here, in *Kotteakos* the indictment alleged one single conspiracy and the proof showed at least 8, the kingpin or nexus being one Simon Brown. A severance was refused by the trial court and all defendants were tried in one mass trial. This Court opined that the Trial Court, in its instruction to the jury, "obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character." (p. 1250). Justice Douglas (joined by Justice Reed) in dissent stated that "on the record no implication of guilt by reason of a mass trial can be found." (p. 1254). Additionally, Justice Douglas stated "the situation would be different if membership in the conspiracy were shown by slight evidence of knowledge and association and the acts of others would need to be imputed to a defendant in order to establish guilt beyond a reasonable doubt." (p. 1255). This last, even in dissent, highlights the exact situation facing Petitioner here. The only evidence was the uncorroborated word of a convict who had been promised a large reduction in his sentence to implicate Petitioner in criminal activity. The inherent weakness of the government's case in such a scenario is evident, but that weakness can be dissipated by joining the alleged conspiracy by Petitioner with great numbers of conspirators alleged to be involved in a separate and distinct conspiracy, albeit having one man as the nexus of several. In *Kotteakos*, the court stated:

> But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the

> same time to scores of men involved, if at all, only separately in them. The dangers for transference of guilt from one to another across the line separating conspiracies or otherwise, are so great that no one can really say prejudice to a substantial right has not taken place. The line must be drawn somewhere. (p. 1252).

In point of fact, cases briefed by both parties in the court below indicate that the government has in fact been allowed to extend the practice ad infinitum in virtually every circuit in the United States.

By way of illustration, the Fifth Circuit conceded (p. 1127) that "other than a common source of supply, however, the evidence does not establish any interdependence between Gonzalez' and Gils' various distributors." The Court of Appeals next holds that when the indictment alleges a conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting the defendant's substantial rights. (p. 1128). Thereafter, the Court concedes, most importantly to Petitioner's argument, that this general rule has never been held to be absolute and that if it were, it would be "hard to square" with *Kotteakos*. (p. 1128). The Court cites *U.S. v. Faulkner*, 17 F.3d 745, 762 (CA 5 1994) in support of such a pronouncement. What the panel in Petitioner's case ignored is recognized in the very case they cite, *Faulkner, supra,* at page 762. The *Faulkner* panel noted that the Fifth Circuit has not held the rule to be absolute but then stated "nor do we believe that our circuit has delineated any clear cut exceptions to this rule." Since there are no exceptions to the rule, it is

absolute as a practical matter, and cannot be squared with *Kotteakos*. (p. 762).

C. Effect of Standard Multiple Conspiracy Jury Instruction

The Court of Appeals additionally held that the District Court's multiple conspiracy jury instruction (p. 1128 Fnte. 9) safeguarded Petitioner against the possibility of guilt transference.

This is but one of the ways in which the Appellate Courts have attempted to side step the teachings of *Kotteakos*. An examination of the quoted instruction demonstrates prejudice and harm. As drafted, if the government's witness Felipe Madrid entered into some conspiracy with Eduardo Gonzalez (the nexus or kingpin) and 40 other people, and it is alleged that Petitioner was a party to that conspiracy, the jury could so find if the only evidence was an agreement with Felipe Madrid, since Felipe Madrid was connected to Eduardo Gonzalez and the other conspirators in a separate conspiracy. The problem with this approach is that the government can connect an extremely weak case (Petitioner's) with an extremely strong case, simply by alleging a single conspiracy and count on the spillover effect and a transference of guilt from evidence against the persons accused in the strong case to the individual accused in the weak or non-existent case.

The Court of Appeals opined (p. 1127) "in any event, we pretermit a finding on the existence of a variance because even if one is assumed, we conclude that the

appellants cannot establish that any variance that existed affected their substantial rights."

Consider that statement in light of the following, again quoting from *Kotteakos*:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand . . . but if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. *Kotteakos*, 66 S.Ct. at 1248.

Numerous cases in the Fifth and other federal circuits, indeed, in opinions too numerous to be cited due to length constraints, likewise cavalierly review the teachings of *Kotteakos* and then say "but . . . " and proceed to ignore them. *U.S. v. Devarona*, 872 F.2d 114 (CA 5 1989); *U.S. v. Faulkner*, 17 F.3d 745 (CA 5 1994); *U.S. v. Martino*, 648 F.2d 367 (CA 5 1981); *U.S. v. Sutherland*, 656 F.2d 1181 (CA 5 1981); *U.S. v. Townsend*, 924 F.2d 1385 (1991).

D. Concerning Rules 8(b) and 14, F.R.C.P.

This Court, in *U.S. v. Lane*, 106 S.Ct. 725 (1985) has reaffirmed the vitality of *Kotteakos, supra*, in holding that

an error involving misjoinder affects substantial rights and reversal is acquired if the joinder results in actual prejudice.

The record is replete with Petitioner's attempts to get the trial judge, pre, during and post trial, to recognize the inherent prejudice and harm in requiring him to stand trial with 25 plus other defendants involved in a totally separate conspiracy having nothing to do with Petitioner. Whether severance was appropriate under Rule 8(b), *supra*, may be arguable but further begs the question as to whether the Court, after hearing substantial parts of the evidence (only 91 pages out of a 3800 page Statement of Facts relate to Petitioner and Defendants Russell and Dickinson) violated a continuing duty under Rule 14 to sever Petitioner in order to prevent prejudice, harm and to do substantial justice and insure a fair trial.

E. Concerning the Fifth Amendment Due Process Problem.

It has long been the rule that, in the federal jurisdiction, the uncorroborated testimony of a single individual is sufficient to support conviction if the jury believes that person, even though he is a party to the charged offense.

The government has seized with glee upon this principal and, as illustrated by this case, routinely goes into the prisons promising large rewards of cut sentences, non-prosecution in other cases and things of similar nature to the inmates in exchange for denouncing some citizen. This is an extremely dangerous, unfair practice and at bottom, violative of substantive due process in the trial of criminal matters. It simply reeks of practices

historically and notoriously carried out by agencies such as the Nazi SS and the Russian KGB where persons in the clutches of the government are either threatened with horrible circumstances or large rewards in order to convince them to denounce citizens against whom the government is unable otherwise to prove criminal or political violations.

Seemingly, the courts have approved such actions by government agents, especially in drug cases, on the theory that, because the drug problem is so overwhelming, we must resort to tactics usually reserved to the rulers of totalitarian countries in order to obtain convictions.

Here, Petitioner had a short legitimate business connection with the government's informant Felipe Madrid. Mr. Madrid, on a frolic of his own, landed in durance vile for a lengthy period of time. The government approached him, promised him a large reduction in sentence, non prosecution in the instant cause and he pointed out Petitioner. There was not one scintilla or iota of evidence other than that against Petitioner and it is submitted that the result might have been quite different with any rational jury had the government not chosen to join Petitioner in a large, well-documented conspiracy, involving persons and activities with absolutely no relation to the allegations against Petitioner, or had Petitioner's severance requests been granted.

This Court should consider that there must be a point beyond which the government cannot go and that point should be that the government must have at least some

evidence corroborating the accomplice before conviction can be sustained.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Petitioner prays that this honorable Court grant a writ of certiorari reviewing the decision of the United States Court of Appeals for the Fifth Circuit and thereafter reverse that decision.

Respectfully submitted,

MICHAEL R. GIBSON
Attorney for Petitioner
521 Texas Avenue
El Paso, Texas 79901
(915) 532-2977
State Bar Number 07872000

* * *

UNITED STATES of America,
Plaintiff-Appellee,

v.

Arturo PENA-RODRIGUEZ, Maxwell Gene Wallace, Lloyd Maestas, Bob Alan Dickinson, a/k/a "Fred", a/k/a Robert Alan Dickinson, Leonard Gene Lied, Avelino Gil-Terrazas, Ruben Gallegos, Hector Mendoza-Garcia, and William Hobert Russell, a/k/a "El Indio", a/k/a William Hobart Russell,
Defendants-Appellants.

No. 95-50077.

United States Court of Appeals,
Fifth Circuit.

April 10, 1997.

Defendants were convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of conspiracy to possess with intent to distribute marijuana and cocaine, and two defendants were also convicted of conspiracy to launder money. Defendants appealed. The Court of Appeals, Benavides, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) even if indictment alleging single conspiracy to distribute cocaine and marijuana varied from proof at trial, allegedly showing two conspiracies, variance did not affect defendants' substantial rights, and was not fatal; and (3) good faith exception to exclusionary rule applied to search conducted pursuant to warrant allegedly containing stale information.

Affirmed.

Richard L. Durbin, Jr., Asst. U.S. Attorney, San Antonio, TX, for Plaintiff-Appellee.

Robert Ramos, El Paso, TX, for Arturo Pena-Rodriguez and Hector Mendoza-Garcia, Defendants-Appellants.

J. Albert Kroemer, Hill, Held, Metzger, Lofgven & Peele, Dallas, TX, for Maxwell Gene Wallace, Defendant-Appellant.

Timothy M. Padilla, Todd Bruce Hotchkiss, Timothy M. Padilla & Associates, Albuquerque, NM, for Lloyd Maestas, Defendant-Appellant.

Carlos D. Villa, El Paso, TX, for Bob Alan Dickinson aka Robert Alan Dickinson aka "Fred", Defendant-Appellant.

Michael R. Gibson, El Paso, TX, for Leonard Gene Lied, Defendant-Appellant.

Thomas Sanders Hughes, El Paso, TX, for Ruben Gallegos, Defendant-Appellant.

Bernard J. Panetta, II, El Paso, TX, for William Hobert Russell aka "El Indio", Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas.

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

This case involves an appeal by eight appellants from convictions for various narcotics offenses related to their

roles in an international narcotics-distribution organization. The superseding grand jury indictment charged thirty-two defendants with eight counts and resulted in a three-week trial involving eighteen defendants. At trial, the government called over 100 witnesses and entered more than 800 exhibits into evidence. Each of the appellants was convicted on the first count of the indictment, which alleged a conspiracy to possess with the intent to distribute marijuana and cocaine in violation of 21 U.S.C. §§ 841(a)(1) & 846. In addition, appellants William Hobart Russell and Leonard Gene Lied were convicted of count eight of the indictment, which alleged a conspiracy to launder money in violation of 18 U.S.C. § 1956(a)(1)(A)(I).

The convictions at issue were the result of an investigation by law enforcement agencies that established the existence of a large-scale drug conspiracy. The leaders of the organization were Eduardo Gonzalez-Quirarte ("Gonzalez") and Avelino Gil-Terrazas ("Gil"). The organization imported marijuana and cocaine into El Paso, Texas, and distributed the narcotics to various states throughout the country, including California, Oklahoma, Indiana, Florida, Colorado, and New Mexico. The organization transported its contraband in pickup trucks, horse trailers, and semi-tractors that contained hidden compartments.

Appellants contest their convictions on various grounds. In addition, a number of the appellants challenge the district court's calculation of their sentences under the applicable Sentencing Guidelines. For the reasons that follow, we AFFIRM the judgment of the district court in all respects.

I. Sufficiency of the Evidence

Appellants Leonard Gene Lied, William Hobart Russell, Bob Alan Dickinson, Ruben Gallegos, Maxwell Gene Wallace, and Arturo Pena-Rodriguez argue that there is insufficient evidence to support their convictions for conspiring to possess marijuana or cocaine with the intent to distribute under count one. In addition, Lied and Russell contend that the evidence was insufficient to support their convictions under count eight for conspiring to launder money. In conducting a sufficiency review, we must view the evidence and the inferences therefrom in the light most favorable to the jury's verdict and determine whether "a rational trier of fact could have found these defendants guilty beyond a reasonable doubt." *United States v. Velgar-Vivero*, 8 F.3d 236, 239 (5th Cir.1993), *cert. denied*, 511 U.S. 1096, 114 S.Ct. 1865, 128 L.Ed.2d 486 (1994).

The elements of a drug conspiracy are: "(1) the existence of an agreement between two or more persons to violate narcotics law; (2) the defendant's knowledge of the agreement; and (3) the defendant's voluntary participation in the agreement." *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir.1996). Similarly, a conspiracy to launder money under § 1956(a)(1)(A)(I) requires proof that "(1) there is a conspiratorial agreement, (2) one conspirator knowingly commits an overt act by participating in a financial transaction, (3) the financial transaction involves the proceeds of an unlawful activity, (4) the conspirator participating in the transaction had the intent to promote or further that unlawful activity, and (5) the transaction affected interstate or foreign commerce."

United States v. Fierro, 38 F.3d 761, 768 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1431, 131 L.Ed.2d 312 (1995).

This court has recognized that "[a] jury may infer the elements of a conspiracy conviction from circumstantial evidence. . . . " *United States v. Leal*, 74 F.3d 600, 606 (5th Cir.1996). We have also held that "a guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face." *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1825, 131 L.Ed.2d 746 (1995). "Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature." *Id.*

With these principles in mind, we find that the following evidence presented by the government was sufficient to sustain each of the convictions against the appellants.

A. The Dallas Appellants

The evidence against Lied, Russell, and Dickinson (collectively "the Dallas Appellants") consisted primarily of the testimony of Felipe Madrid, Jr., a co-conspirator, governmental informant, and owner of United Freight Service ("UFS"), the corporation through which the Dallas Appellants conducted their drug-trafficking activities. Madrid testified that in the summer of 1990 he met with Gonzalez, Gil, and Lied to plan what they were going to do with "the proceeds of marijuana." According

to Madrid, he served as an interpreter and middle man for the drug organization, wherein Gonzalez was the supplier and Lied was Gonzalez's original distributor in the Dallas area. Madrid testified that this organization began operating in the fall of 1990.

Madrid described the organization's standard procedure for handling a load of marijuana. The process began when Gonzalez arranged for Madrid to pick up marijuana from various locations in El Paso with his van. Madrid then took the marijuana to a "stash house" located on Dale Douglas Street in El Paso where it was weighed and repackaged in small boxes. The small boxes of marijuana were then placed in the van and transported to a warehouse on Rojas Street in El Paso. At the warehouse, Madrid placed the small boxes of marijuana inside larger boxes, filled the larger boxes with Styrofoam, and loaded an 18-wheeler with the larger boxes. Madrid then drove the 18-wheeler to one of two warehouses rented by the organization in the Dallas area.

More specifically, Madrid testified that on one occasion Gil gave him a three- to five-pound sample of marijuana that he took to Lied.[1] Madrid also testified that it was standard procedure for him to give a copy of the recorded weights of shipments of marijuana to Lied. Those weights were used to determine how much the particular load of marijuana was worth. In addition, the weights were relevant because Lied paid Madrid for his work at the rate of $15 per pound of marijuana that he

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[1] Samples are used in the drug trade to demonstrate the general quality of the merchandise, which, in turn, affects the price that the distributor must pay for the goods.

hauled. Madrid testified that he had an ongoing discussion with Lied regarding the delivery of money to Gonzalez for marijuana. On at least a few occasions, Lied gave Madrid drug money that he subsequently delivered to Gonzalez. Moreover, on one occasion in which drug money was transferred, Madrid testified that he, Gonzalez, Gallegos, and Lied were all present. The amounts of these drug payments ranged from $150,000 to $700,000.

Dickinson was the freight manager for UFS. While it is undisputed that Dickinson handled a sizable amount of legitimate cargo hauled by UFS, Madrid testified that Dickinson also participated in the organization's drug-trafficking activities. For example, the organization's stash house on Dale Douglas was rented in Dickinson's name. Moreover, Madrid testified that Dickinson sometimes helped him weigh and repackage the marijuana at the stash house. Finally, Madrid testified that it was "his belief" that on several occasions Dickinson drove trucks that he knew were full of marijuana and picked up drug money. Finally, Madrid testified that Dickinson sometimes helped him count the money that they received for marijuana.[2] In this regard, in the fall of 1991, Dickinson and Madrid complained to each other about the infrequency and insufficient amounts of Lied's most recent payments.

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[2] Dickinson was acquitted of money laundering, however, when the jury failed to reach a verdict on that count. *See* FED. R. CRIM. P. 29.

Madrid testified that on one occasion in late December of 1991, he saw Russell at the organization's warehouse in Forney, Texas. Russell was talking to several of the organization's Dallas-based employees and was aware that Madrid was unloading marijuana. According to Madrid, Russell's appearance at the warehouse coincided with a change in management in the organization whereby Lied broke off his ties to the organization and Russell took over Lied's role as distributor in the Dallas area. Madrid testified that Russell paid him approximately $20,000 or $30,000 for transporting marijuana on one occasion.

Madrid's active participation in the organization involving the Dallas Appellants concluded in April 1992 when he was arrested and later convicted on an unrelated charge. Madrid testified that the organization owed him approximately $250,000 in "back pay" at the time of his arrest. Madrid told his ex-wife, Gloria Stitt, that any money that he was owed would come from Russell and that she could keep whatever she could procure for their children.

Stitt, a paid governmental informant, enlisted the aid of her brother, Henry Garcia, to procure some of the money owed Madrid by the organization. Garcia wrote Madrid a letter in which Garcia stated that "El Indio wants me to ask what you want done with your cake. . . . " Madrid testified that "El Indio" was Russell's nickname and that "cake" was code for "money" in the organization. Madrid subsequently sent Stitt to pick up the money from Garcia. Garcia gave Stitt a box containing large denominations of cash totaling $60,000. Stitt turned the

box and the money over to the government, and at trial she testified consistently with Madrid about these events.

From such evidence, the jury could rationally have concluded beyond a reasonable doubt that each of the Dallas Appellants knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute marijuana. The foregoing evidence was also sufficient to sustain the convictions of Lied and Russell for engaging in a conspiracy to launder money. Specifically, Madrid testified that he received large sums of drug money from Lied and delivered those proceeds to Gonzalez. Furthermore, significant evidence was presented that Russell transferred $60,000 in drug proceeds to Garcia as "backpay" for the work Madrid had done on behalf of the organization. *See United States v. Flores*, 63 F.3d 1342, 1361 (5th Cir.1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996); *United States v. Puig-Infante*, 19 F.3d 929, 937-42 (5th Cir.), *cert. denied*, 513 U.S. 864, 115 S.Ct. 180, 130 L.Ed.2d 115 (1994).

B. The Oklahoma Appellants

The evidence to sustain convictions presented against Appellants Wallace and Pena-Rodriguez (collectively "the Oklahoma Appellants") came primarily from the testimony of two co-conspirators and governmental informants, Clifford W. Mengers and Randall Bowers. Mengers testified that he was a professional truck driver and small-time drug dealer in Oklahoma. On one occasion, Wallace called Mengers and asked for his help in backing up a horse trailer near Wallace's garage. The horse trailer, which Mengers understood had come from El Paso, had

Texas license plates and a hidden compartment that contained marijuana. Mengers testified that he observed Wallace and Jose Gomez remove marijuana from the trailer's hidden compartment.[3]

Mengers also testified that Wallace told him on several occasions that Wallace was expecting to receive cocaine from a man named Arthur. Mengers testified that it was his understanding that "Arthur" was Appellant Pena-Rodriguez because Pena-Rodriguez was the only Arthur that Mengers knew. On one occasion, in fact, Mengers found several kilograms of cocaine in the trunk of Wallace's car, which was being stored in Mengers's garage.

Randall Bowers testified that in 1990, Jose Gomez and he drove a horse trailer containing 350 pounds of marijuana to Wallace's house. Bowers noted that both Wallace and Pena-Rodriguez helped Gomez and him unload the trailer. Bowers also testified that he delivered a load of marijuana to Pena-Rodriguez in early 1991. As compensation for his work, Pena-Rodriguez gave Bowers use of a fancy Chevrolet pickup truck known as "the Boss."

The foregoing evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Wallace

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[3] Evidence that the horse trailer came from El Paso and contained a hidden compartment indicates that this marijuana was part of the larger conspiracy charged in the indictment. Moreover, a variety of evidence in the record ties Jose Gomez, a charged co-conspirator, to other participants in the conspiracy, including Randall Bowers.

and Pena-Rodriguez knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute marijuana and cocaine.

C. Ruben Gallegos

Appellant Gallegos was a part owner of the Truck Center of El Paso along with his brother, Art Gallegos, and Eduardo Gonzalez. According to the government's theory of the case, Gallegos's role in the organization consisted primarily of providing vehicles for the shipment of marijuana and cocaine, as well as constructing false fuel tanks that were used to store contraband during its transportation. Gallegos had the distinction of being the only appellant who was the subject of testimony by both of the government's star witnesses, Felipe Madrid, Jr. and Randall Bowers.

Bowers testified that he transported some false fuel tanks that were constructed in California to El Paso and gave them to Gallegos. When Bowers delivered the tanks, Gallegos told him that some of the other tanks used by the organization for smuggling had leaks in them. Gallegos knew this to be the case because he had tested the tanks with water and the tanks leaked. Gallegos expressed concern both that diesel fuel was leaking from the tanks onto the pavement and that fuel was entering into the compartment that stored contraband. Despite this quality control concern, Gallegos accepted the tanks from Bowers.

On another occasion, Bowers picked up a load of cocaine from Avelino Gil's house. Bowers met with Avelino and Norma Gil while waiting for his truck to be

loaded. During the ensuing discussion, Gallegos entered the room and announced that "it was ready." Bowers testified that he understood this statement to mean that the altered fuel tanks were ready. Bowers also testified that when Gallegos entered, he was covered with "bondo" dust. Other testimony in the record established that bondo was used to seal the false fuel tanks used by the organization after the tanks were filled with contraband.

Madrid testified that on one or two occasions, when Gonzalez was not available, Gallegos coordinated the pick up of a load of marijuana. Moreover, Gallegos was present when Madrid (on Lied's behalf) transferred $700,000 in drug money to Gonzalez, and Gallegos saw the suitcase that contained the money. Finally, on the day that Madrid was arrested, he had a number of calling cards in his possession. The names and numbers on these cards were in code, presumably to protect the subjects' identities. Madrid testified that one of these cards contained the coded names and phone numbers corresponding to Gallegos, Gil, and Gonzalez.

Again, this evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Gallegos knowingly and voluntarily participated in a conspiracy to possess with the intent to distribute narcotics.

II. Multiple Conspiracies

Appellants Lied, Dickinson, Russell, Wallace, and Gallegos argue that a fatal variance existed between the indictment, which alleged a single conspiracy, and the proof at trial, which established the existence of two or

more separate and independent conspiracies. Appellants claim that they were prejudiced by the transference of guilt created by voluminous evidence of illegal activity implicating unrelated defendants with whom they were tried. *See Kotteakos v. United States*, 328 U.S. 750, 774, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946); *United States v. Sutherland*, 656 F.2d 1181, 1196 (5th Cir.1981), *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982). In other words, the appellants argue that the prosecution violated "the[ir] right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others." *Kotteakos*, 328 U.S. at 775, 66 S.Ct. at 1253.

To prevail on this claim, the appellants must prove that (1) a variance existed between the indictment and the proof at trial, and (2) the variance affected their substantial rights. *United States v. Morris*, 46 F.3d 410, 414 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2595, 132 L.Ed.2d 842 (1995). "To determine whether a variance existed between the indictment and the proof at trial, the number of conspiracies proved at trial must be counted." *Id.* at 415. Whether the evidence shows one or multiple conspiracies is a question of fact for the jury. *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir.), *cert. denied*, 502 U.S. 917, 112 S.Ct. 322, 116 L.Ed.2d 263 (1991). "The principal considerations in counting conspiracies are (1) the existence of a common goal, (2) the nature of the scheme, and (3) the overlapping of participants in the various dealings."[4] *Morris*, 46 F.3d at 415. A jury's finding

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[4] This circuit has also looked to a different set of factors to count the number of conspiracies proven at trial. These factors include: "(1) the time period involved, (2) the persons acting as

that the government proved a single conspiracy must be affirmed unless the evidence viewed in the light most favorable to the government would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt. *Id.*

Appellants argue that a functional analysis of the proof at trial establishes the existence of at least two separate and independent conspiracies.[5] These conspiracies were purportedly identified and described by the government's two star witnesses, Bowers and Madrid, neither of whom mentioned the other in his testimony. According to the appellants, the following factors indicate that Bowers and Madrid described two separate and independent conspiracies: (1) the "Bowers conspiracy" distributed both cocaine and marijuana, whereas the "Madrid conspiracy" distributed only marijuana; (2) the Bowers conspiracy packaged its narcotics at "stash houses" located on Thunder Road and Gage Road in El Paso, whereas the Madrid conspiracy packaged its drugs on Dale Douglas and Rojas Streets in El Paso; (3) the Bowers conspiracy transported its drugs in vehicles with false compartments, whereas the Madrid conspiracy transported its vehicles in unaltered vans and semi-

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co-conspirators, (3) the statutory offenses charged in the indictment, (4) the nature and scope of the criminal activity, and (5) the places where the events alleged as the conspiracy took place." *United States v. Thomas*, 12 F.3d 1350, 1357 (5th Cir.), *cert. denied*, 511 U.S. 1095, 114 S.Ct. 1861, 128 L.Ed.2d 483 (1994).

[5] *See Morris*, 46 F.3d at 415 & n. 2 (noting that this court has moved away from a structural and formal examination of the criminal enterprise toward a more functional and substantive analysis).

trailers; (4) the Bowers conspiracy distributed its drugs to Indiana, New Mexico, Oklahoma, and California, whereas the Madrid conspiracy distributed its drugs to Dallas; and (5) the Bowers conspiracy operated from May 1987 through 1993, whereas the Madrid conspiracy operated only from the summer of 1991 until April 1992. In sum, the appellants argue that the two conspiracies packaged different drugs at different places and distributed them to different locations at different times.

In contrast, the government argues that the proof at trial, viewed in the light most favorable to the verdict, was sufficient for a rational jury to find a single conspiracy beyond a reasonable doubt. The government contends that this court's past application of each of the factors it has deemed relevant to counting conspiracies supports the government's position in this case. First, the government claims that each member of this conspiracy had the common goal of deriving personal gain from the procurement and distribution of controlled substances.[6] Second, the government contends that the nature of this conspiracy was such that its success "depended on the continued willingness of each member to perform his function."[7] Finally, the government contends that "[a]

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[6] *See id.* (noting that this court has defined a common goal so broadly that the requirement may have "become a mere matter of semantics") (quoting *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir.1987)).

[7] *Id.* at 416 (quoting *Richerson*, 833 F.2d at 1154). In concluding that the nature of a criminal scheme evidenced a single conspiracy, the *Morris* court explained:

> If the sellers discontinued selling, there would be no cocaine for [the distributor] and the purchasers to

single conspiracy exists where a 'key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal."[8] According to the government, Gonzalez and Gil, the organization's alleged kingpins, were the "key men" in this conspiracy.

A thorough review of the record establishes that Gonzalez and Gil were, in fact, the leaders of an organization based in El Paso that was supplying marijuana and cocaine to various distributors in California, Oklahoma, Indiana, Florida, Colorado, New Mexico, and Texas. The evidence also establishes that appellant Gallegos helped Gonzalez and Gil in their efforts to supply narcotics to other appellants on several occasions. Other than a common source of supply, however, the evidence does not establish any interdependence between Gonzalez's and Gil's various distributors. Complicating our inquiry, moreover, is the fact that Gonzalez and Gil, the "key men" allegedly tying the conspiracy together, were fugitives from justice who were not present at trial. In any

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> buy. The necessity of a steady cocaine supply to feed a distribution effort is beyond question. Likewise, the distribution effort is critical to the success of the suppliers. If the purchasers ceased to buy, there would be no reason for [the distributor] to buy from the sellers, and hence no reason for the sellers to acquire the cocaine. Thus, although the sellers and the purchasers may not have had a direct relationship with each other, each was necessary for the continued success of the venture.

Id. (internal quotations and citations omitted).

[8] *Id.* (quoting *Richerson*, 833 F.2d at 1154).

event, we pretermit a finding on the existence of a variance because even if one is assumed, we conclude that the appellants cannot establish that any variance that existed affected their substantial rights.

In *Kotteakos v. United States*, 328 U.S. at 766, 66 S.Ct. at 1248-49, the Supreme Court found that a group of defendants had been sufficiently prejudiced by a variance to justify reversal. In reaching its decision, the Court emphasized the size and complexity of the conspiracies involved. More important, however, the Court found that prejudice inhered in the trial because of "[t]he dangers of transference of guilt from one to another across the line separating conspiracies." *Id.* at 774, 66 S.Ct. at 1252. The Court concluded that "[i]n the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." *Id.* at 762, 66 S.Ct. at 1247.

This court has "long held that when the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." *United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir.), *cert. denied*, 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994) (internal quotations and citations omitted). We have also pointed out, however, that we have never held this general rule to be absolute. *Id.* In this regard, we have acknowledged that such an absolute rule would be hard to square with Kotteakos. *Id.* at 765 n. 20, 66 S.Ct. at 1248 n. 20.

In *United States v. Faulkner,* we elaborated on the requisites of establishing a fatal variance in this circuit:

> [The] doctrine regarding variance between an indictment alleging a single conspiracy and proof of separate conspiracies is but one subset of the general concerns of improper joinder and severance. We therefore conclude that where the indictment alleges a single conspiracy and the evidence establishes each defendant's participation in at least one conspiracy[,] a defendant's substantial rights are affected only if the defendant can establish reversible error under general principles of joinder and severance.

Id. at 762 (footnote omitted). Thus, we look to the law of joinder and severance to determine whether the appellants' substantial rights were affected in this case.

In this regard, Rule 14 of the Federal Rules of Criminal Procedure provides that a court may order a severance "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together. . . . " FED. R. CRIM. P. 14. A denial of a motion for severance is reviewed for an abuse of discretion. *Faulkner,* 17 F.3d at 759. To satisfy this standard of review, the defendant "bears the burden of showing specific and compelling prejudice that resulted in an unfair trial and such prejudice must be of a type against which the trial court was unable to afford protection." *Id.* (internal quotations and citations omitted). Any possibility of prejudice, moreover, must be balanced against the public's interest in the efficient administration of justice. *United States v. Hernandez,* 962 F.2d 1152, 1158 (5th Cir.1992). "The rule, rather than the exception, is that persons

indicted together should be tried together, especially in conspiracy cases." *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir.), *cert. denied*, 510 U.S. 898, 114 S.Ct. 266, 126 L.Ed.2d 218 (1993).

A number of factors lead us to conclude that the appellants did not suffer specific and compelling prejudice resulting in a fatal variance. First, the evidence was sufficient to prove each appellant's participation in at least one conspiracy. *See* Part I, *supra; Faulkner*, 17 F.3d at 762. In addition, the district court's multiple conspiracy jury instruction safeguarded the appellants against the possibility of guilt transference.[9] This court has found

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[9] The district court's instruction provided:

> You are instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count One of the indictment. What you must do is determine whether the single conspiracy charged in Count One existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy alleged in Count One existed, you must determine who were the members of that conspiracy.
>
> You are further instructed that proof of several separate conspiracies is not proof of a single, overall conspiracy unless one of the several conspiracies which is proved is the conspiracy charged in Count Eight of the indictment. What you must do is determine whether the single conspiracy charged in Count Eight existed between two or more defendants. If you find no such conspiracy existed, then you must acquit all of the defendants as to that charge. However, if you are satisfied that the conspiracy

similar instructions sufficient to cure any possibility of prejudice in other cases. *See, e.g., Faulkner,* 17 F.3d at 759; *Guerra-Marez,* 928 F.2d at 672.

We are also persuaded that evidence exists that the jury was, in fact, able to follow the evidence and reach a fair and impartial verdict against each appellant. *See United States v. Diaz-Munoz,* 632 F.2d 1330, 1337 (5th Cir.1980) (recognizing that the inquiry regarding prejudice involves whether the jury can "keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?"). Although the jury did not acquit any of the defendants at trial, it was unable to reach a verdict on two counts, which were eventually dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure. *Cf. Faulkner,* 17 F.3d at 759. One of the charges on which the jury hung was the money laundering charge against Gallegos under count eight of the indictment. The relevant evidence on this count included Madrid's testimony that he transferred a suitcase containing approximately $700,000 in drug proceeds to Gallegos in the presence of Gonzalez and Lied. Madrid testified that Gallegos saw the suitcase but "not necessarily" the money inside. Given this evidence, the jury's failure to

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alleged in Count Eight existed, you must determine who were the members of that conspiracy.

If you find that a defendant was a member of another conspiracy, but not the one charged in Count One or the one charged in Count Eight of the indictment, then you must acquit that defendant as to that count. In other words, you must find that he or she was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

reach a verdict on this count supports an inference that it was able to consider each defendant and each charge separately.

Finally, we note that the verdicts against the appellants in this case did not turn on particularly complex evidence that was likely to confuse the jury. The government implicated the appellants by relying almost exclusively on the direct testimony of co-conspirators and governmental informants. Such testimony was precise in establishing that each of the appellants knew of and participated in a drug conspiracy. While the appellants attempted to discredit the reliability of these witnesses at every stage of the proceedings, their strategy did not work. Instead, the jury chose to believe the government's witnesses and return guilty verdicts. There was no danger that the criminal acts of some would be carried over to the others because the culpability of each was clearly and distinctly proved. In circumstances such as these, when a pure credibility determination was at issue, we are not inclined to disturb a decision that was quite properly and directly within the jury's province.

III. Fourth Amendment Search

At trial, appellant Lloyd Phillip Maestas moved to suppress evidence attained during a February 27, 1994 search of his ranch in New Mexico because the material facts alleged in the affidavit for the search warrant were based on stale information. The district court found that the information upon which the affidavit was based indicated a long-standing, ongoing pattern of criminal activity. The district court, therefore, concluded that the

warrant was supported by probable cause and denied Maestas's suppression motion. On appeal, Maestas contends that the district court's decision constituted reversible error.

This court engages in a two-step review of a district court's denial of a defendant's motion to suppress. *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir.1992). The first step requires the court to determine whether the good-faith exception to the exclusionary rule applies. *See United States v. Leon*, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21, 82 L.Ed.2d 677 (1984). The second step requires the court "to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed." *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332-33, 76 L.Ed.2d 527 (1983) (internal quotation omitted). If the good-faith exception applies, the court need not reach the question of probable cause. *Satterwhite*, 980 F.2d at 320; *see also United States v. Craig*, 861 F.2d 818, 820 (5th Cir.1988) ("Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of the evidence under the good-faith exception of *Leon* will resolve the matter").[10]

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[10] We have indicated that "[t]he only instances in which this maxim should not be followed are those in which the resolution of a 'novel question of law . . . is necessary to guide future action by law enforcement officers and magistrates.' " *Craig*, 861 F.2d at 820-21 (quoting *Gates*, 462 U.S. at 264, 103 S.Ct. at 2346 (White, J., concurring)). Moreover, we recognized in *Craig* that "whether the facts alleged in the affidavit were so dated that they failed to establish probable cause at the time the warrant was issued" does not raise a novel question of law. *Id.* at 821.

In *Leon*, the Supreme Court established the good-faith exception, holding "that evidence obtained by law enforcement officials acting in objectively reasonable good-faith reliance upon a search warrant is admissible in the prosecution's case-in-chief, even though the affidavit on which the warrant was based was insufficient to establish probable cause." *Craig*, 861 F.2d at 821 (citing *Leon*, 468 U.S. at 922-23, 104 S.Ct. at 3420-21). "Issuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to the warrant." *Id.* Law enforcement officers cannot establish objective good faith, however, when the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* (quoting *Leon*, 468 U.S. at 923, 104 S.Ct. at 3420-21). *See, e.g., United States v. Jackson*, 818 F.2d 345, 350 & n. 8 (5th Cir.1987) (concluding that a "bare bones" affidavit did not justify good-faith reliance on a warrant); *United States v. Barrington*, 806 F.2d 529, 531-33 (5th Cir.1986) (same).

To prevail on his fourth amendment claim, Maestas must establish that the facts alleged in the affidavit were so dated that no reasonable officer could have believed that the affidavit established probable cause to search his ranch. *Craig*, 861 F.2d at 822. In addressing a similar staleness claim in *United States v. Craig*, we explained:

> Two considerations have consistently appeared in this court's opinions on the issue of staleness. First, if the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the

> issuance of the warrant, the information need not be regarded as stale. Second, the nature of the evidence sought is also relevant. Courts are more tolerant of dated allegations if the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched.

Id. at 822-23 (internal quotations and citations omitted).

The affidavit in the instant case was not so lacking in indicia of probable cause as to render good-faith reliance on a warrant issued pursuant to it entirely unreasonable. The affidavit included information provided by Bowers that set forth the existence of a large-scale and ongoing drug-distribution enterprise. According to Bowers, Maestas's ranch was used by the organization as a distribution point for the shipment of marijuana and cocaine to California, Oklahoma, and Indiana. Bowers claimed that these drugs were transported in the hidden compartments of horse trailers, pickup trucks, and semi-tractors. Approximately six months prior to execution of the contested search warrant, Bowers accompanied federal agents to New Mexico where he pointed out Maestas's ranch and identified several vehicles on the property that Bowers had used to transport drugs.

The affidavit also contained the contemporary observations of government agents that tended to corroborate the information provided by Bowers. Aerial surveillance of Maestas's ranch three days before the contested search produced photographs of several horse trailers and a semi-tractor that were consistent with vehicles described by Bowers. In addition, when Maestas was arrested the day before the contested search, the officers executing

Maestas's arrest warrant observed in plain view a number of vehicles fitting Bowers's description. The officers also observed extra saddle fuel tanks (allegedly used by the organization to store contraband) in plain view on the property. Finally, on the day preceding the contested search, a related search of Gil's property produced a horse trailer with a false compartment that was registered to "Maestas Farms."

Maestas argues that the corroborative evidence gathered by the government contemporaneously with its application for a search warrant should be discarded because the evidence is consistent with the innocent activities of a legitimate rancher. This argument is unavailing. Both the Supreme Court and this circuit have recognized that "innocent behavior frequently will provide the basis for a showing of probable cause." *Gates*, 462 U.S. at 243 n. 13, 103 S.Ct. at 2335 n. 13; *see also United States v. Mendez*, 27 F.3d 126, 129 (5th Cir.1994). Taken together, the information provided by Bowers and the contemporary, corroborative evidence gathered by the government were sufficient for a reasonable officer to believe that the challenged warrant was based on probable cause. Thus, the good-faith exception applies, and the district court did not err in denying Maestas's motion to suppress.

IV. Conclusion

We have considered the other points of error raised by the appellants and have concluded that they are without merit. First, Mendoza-Garcia's double jeopardy claim based on *Grady v. Corbin*, 495 U.S. 508, 510, 110 S.Ct.

2084, 2087, 109 L.Ed.2d 548 (1990), is rejected because *Grady* was overruled by *United States v. Dixon*, 509 U.S. 688, 703-04, 113 S.Ct. 2849, 2859-60, 125 L.Ed.2d 556 (1993).[11] Second, the appellants' contention that the district court's instructions to the jury impermissibly amended the indictment by broadening the charged offense from a conspiracy to possess with the intent to distribute "marijuana and cocaine" to a conspiracy to possess with the intent to distribute "marijuana or cocaine" is rejected. We have held that "a disjunctive statute may be pleaded conjunctively and proved disjunctively." *United States v. Johnson*, 87 F.3d 133, 136 n. 2 (5th Cir.1996) (quoting *United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), *cert. denied*, 500 U.S. 936, 111 S.Ct. 2064, 114 L.Ed.2d 468 (1991) (internal quotations and citations omitted)). Finally, we have considered the arguments raised by the appellants challenging their Guideline-based sentences and have concluded that they also are without merit.

For the foregoing reasons, the convictions and sentences of the appellants are AFFIRMED.

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[11] To prevail on his double jeopardy claim after *Dixon*, Mendoza-Garcia must establish that his conviction violates the same offense rule announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Mendoza-Garcia cannot make this showing. A long line of Supreme Court authority has established "the rule that a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389, 112 S.Ct. 1377, 1384, 118 L.Ed.2d 25 (1992).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50077

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ARTURO PENA-RODRIGUEZ

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, El Paso

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ON PETITION FOR REHEARING

(Filed May 22, 1997)

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50077

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEONARD GENE LIED

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, El Paso

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 10, 1997, 5 Cir., F.3d)

(Filed May 22, 1997)

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request for one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge